FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 19 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 446

AMBASSADOR, INC., *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, and THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

PARKER MCCOLLESTER,
GEORGE DEFOREST LORD,
JOSEPH W. WYATT,
Attorneys for Appellants.

February 16, 1945.

INDEX

	PAGE
OPINION OF THE COURT BELOW	1
STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	1
STATEMENT OF THE CASE	3
The Nature of the Action	3
The Services and Service Charges of the Hotels	5
The Proceedings Before the Federal Communications Commission	9
The Tariff Schedule of the Telephone Company	10
The Institution of This Suit	10
The Decision of the District Court	11
OTHER RELATED PROCEEDINGS	13
SPECIFICATION OF ERRORS	14
SUMMARY OF ARGUMENT	21
ARGUMENT	25
POINT I. The only tariff schedules for enforcement of which an action may be maintained under Section 401 of the Communications Act of 1934 are schedules required to be filed by Section 203. Such schedules are limited to schedules specifying the charges collected and received by common carriers for wire communication service furnished by them and regulations affecting such charges, and do not include schedules specifying or regulating the charges of customers or others for their services. The requirements and prohibitions of Section 203 are addressed only to carriers	25
A. As to Paragraph (a) of Section 203	27
B. As to Paragraph (c) of Section 203	29
POINT II. There is no basis under the Communications Act of 1934 for this suit, since the tariff	

PAGE

schedule sought to be enforced, as construed by the Commission and the court below, is not a schedule required or permitted by Section 203 to be filed and enforced thereunder, in that it does not specify or affect the charges of the telephone company, but attempts to specify or regulate the charge of the hotels which are not carriers for their services which are not communication under the Act ---------- 31

A. The schedule is unenforceable under Section 203 since it does not specify or affect the charges collected by the telephone company, but attempts to specify the charges of the hotels which are not carriers or connecting carriers but subscribers -- 32

B. Even if the hotels were "connecting carriers" the schedule would be unenforceable against them as an attempt to specify their charges without their consent or agreement ---------- 35

C. The schedule is unenforceable under Section 203 since it attempts to specify or regulate the charges for services which are not wire communication by a carrier subject to the Act ---- 36

D. The manner in which the hotels arrive at their service charges and their method of billing do not make them charges to be specified in tariffs filed under Section 203 ---------- 44

POINT III. The schedule, as construed by the lower court, cannot be defended and enforced under Section 203 on the ground that it is a regulation of the telephone company's service ---------- 46

A. It is not a regulation to be enforced under Section 203 since it does not affect the charges collected or received by the telephone company -- 46

B. The schedule is an invalid regulation in that it does not protect any real interest of the tele-

PAGE

phone company, but attempts to control the charges made by the hotels as customers for their own services ---- 48

C. The schedule is invalid as a regulation in that it is a denial of the obligation of the telephone company as a common carrier ---- 55

POINT IV. The lower court's conception of the purpose of the Communications Act of 1934 does not justify the decree ---- 56

POINT V. The enforcement of the telephone company's schedule if construed as prohibiting the hotels from making any charge for their services and expenses would be confiscatory ---- 59

POINT VI. The telephone company's schedule is valid only if construed as not having reference to the service charges of the hotels. Under such a construction, there is no violation of Section 203 and the suit should be dismissed ---- 61

POINT VII. In view of the lower court's finding that the telephone company was not violating the Act, it was error to enjoin the hotels ---- 63

POINT VIII. This case is distinguishable from the cases relied upon by the Commission in its report ---- 65

CONCLUSION ---- 66

APPENDIX. Pertinent Provisions of the Communications Act of 1934 ---- 69

CASES CITED

Acme Fast Freight *v.* United States, 30 F. Supp. 968 57

Albany Packing Co., Inc. *v.* Atchison, T. & S. F. Ry. Co., 245 I. C. C. 741 ---- 28

PAGE

Andrae & Sons Co. *v.* Chicago, M. & St. P. Ry. Co., 153 I. C. C. 227 ---- 62

Chesapeake & Potomac Tel. Co. *v.* Manning, 186 U. S. 238 ---- 40, 52

Doran & Company *v.* N., C. & St. L. Ry., 33 I. C. C. 523 ---- 50

Great Northern Ry. *v.* Delmar Co., 283 U. S. 686 ---- 62

Hotel Pfister *v.* Wisconsin Telephone Co., 203 Wis. 20 65
Hull Co. *v.* Southern Railway Co., 24 I. C. C. 302 ---- 35

In the Matter of Restricted Rates, 20 I. C. C. 426 ---- 50
Int. Comm. Comm. *v.* Del., L. & W. R. R., 220 U. S. 235 58

Lehigh Valley R. R. Co. *v.* United States, 243 U. S. 444 57

Matter of Motor Haulage Company *v.* Maltbie, 293 N. Y. 338 ---- 34
Michigan Public Utilities Commission *v.* Duke, 266 U. S. 570 ---- 34

N. Y. C. & H. R. R. R. Co. *v.* General Electric, 219 N. Y. 227 ---- 53
New York, New Haven & Hartford R. R. Co. *v.* Platt, 7 I. C. C. 323 ---- 35
Norwich Wire Works, Inc. *v.* Boston & M. R., 229 I. C. C. 395 ---- 62

Pacific S. S. Co. *v.* Cackette, 8 F. (2d) 259 ---- 36
Penn Oil Co. *v.* Atchison, T. & S. F. Ry. Co., 188 I. C. C. 351 ---- 62
Penna. R. R. Co. *v.* International Coal Co., 230 U. S. 184 60
People ex rel. Public Service Commission *v.* New York Telephone Co., 262 App. Div. 440 ---- 65
Practices of Carriers Affecting Operating Revenues or Expenses, 209 I. C. C. 11 ---- 53

PAGE

Reciprocal Switching at Detroit, 215 I. C. C. 284 ..28, 35, 50
Refrigerator Car Mileage Allowances, 232 I. C. C. 276 29, 35

Scripps-Howard Radio *v.* Comm'n, 316 U. S. 14 59
Southern Pacific Co. *v.* United States, 272 U. S. 445 ... 36
Swift & Co. *v.* United States, 316 U. S. 216 .....35, 53, 59

Thompson *v.* Chicago, B. & Q. R. Co., 157 I. C. C. 775 ..28, 36

U. S. *v.* Am. Tin Plate Co., 301 U. S. 402 53

Warehouse Co. *v.* United States, 283 U. S. 501 .....42, 57
Wheelock *v.* Walsh Fire Clay Products Company, 60 F. (2d) 415 35

STATUTES

Communications Act of 1934 (48 Stat. 1064 ff.) ..1, 5, 9, 15, 16, 20, 28, 55; 63
Section 153(h) 29, 33
Section 203 .....3, 4, 12, 19, 20, 21, 22, 24, 25, 27, 31, 33, 34, 36, 40, 44, 46, 47, 51, 61, 63, 64, 66, 67
Section 203(a) 25, 27, 29, 35
Section 203(c) 26, 29, 30
Section 203(e) 26, 30, 64
Section 204 13
Section 401 .....21, 25
Section 401(c) 3, 34
Section 401(d) 1
Section 402 13
Section 411 63
Section 411(a) 24, 30, 31, 63, 64
Elkins Act (32 Stat. 847, U. S. C. Title 49, Sections 41-43) 29

PAGE

Expediting Act, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. Sec. 29, 49 U. S. C. Sec. 45)
Section 2 ---------- 2
Interstate Commerce Act (24 Stat. 379, U. S. C. Title 49) ---------- 28, 30, 50, 53
Section 6 ---------- 47
Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345)
Section 238 ---------- 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 446

AMBASSADOR, INC., *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, and THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

Opinion of the Court Below

The trial court rendered an oral opinion which is not included in an official report. The oral opinion appears in the record at pages 50-55. The findings of fact and conclusions of law are printed at pages 55-67 of the record.

Statement of the Grounds on Which the Jurisdiction of This Court is Invoked

The jurisdiction of this Court is invoked under the following statutory provisions:

(a) Section 401(d) of the *Communications Act of 1934*, 48 Stat. 1092, 47 U. S. C., Sec. 401(d), which reads as follows:

"The provisions of the Expediting Act, approved February 11, 1903, as amended, and of Section 238(1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under Title II of this Act, wherever the United States is complainant."

(b) Section 2 of the *Expediting Act*, approved February 1, 1903, as amended, 32 Stat. 823, 36 Stat. 1167, 15 U. S. C., Sec. 29, 49 U. S. C., Sec. 45, which reads as follows:

"In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

(c) Section 238 of the *Judicial Code*, as amended, 36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345, which reads in part as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49."

This Court has jurisdiction under these provisions since (a) this is a suit in equity under Title II of the Communications Act; (b) the United States is the complainant, and (c) the case is here on direct appeal from a final decree of the District Court taken within sixty days from the entry thereof (the decree of the District Court was entered on June 8, 1944, and the appeal was allowed by an associate justice of said court on August 2, 1944).

This Court noted probable jurisdiction on November 13, 1944 (R. 306).

Statement of the Case

The Nature of the Action

This is a civil action instituted in the District Court of the United States for the District of Columbia in the name of the United States as complainant but at the request of the Federal Communications Commission. The complaint alleges that the action was brought pursuant to the provisions of Section 401(c) of the Communications Act of 1934*, (hereafter generally referred to as the Act) to enjoin violation of Section 203* thereof by defendants (R. 4). The defendants named were the American Telephone and Telegraph Company and the Chesapeake and Potomac Telephone Company, herein jointly referred to as the telephone company, and twenty-seven hotels in the District of Columbia (R. 1, 2).

Section 203, in so far as it is here pertinent, by subdivision (a) requires "Every common carrier" to file with the Commission "schedules showing all charges for itself and its connecting carriers for interstate and foreign wire * * * communication * * * and showing the classifications, practices and regulations affecting such charges," and by subdivision (c) provides that

> "no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication or for any service connected therewith * * * than the charges specified in the schedule then in effect, or * * * (3) extend to any person any privilege or facilities in such communication, or employ * * * any * * * practices affecting such charges, except as specified in such schedule."

It is not alleged nor has it been found or proved that the hotels are "common carriers" or "carriers".

Nevertheless it is alleged that the hotels violate these provisions by their long-established practice of making so-called service charges to their guests who avail

---

* These and other statutory provisions involved are reproduced in the Appendix hereto.

themselves of the facilities afforded to them by the hotels for making toll telephone calls from their hotel rooms and of the services of the hotels in placing such calls, taking messages, etc. These service charges are designed to compensate the hotels for the substantial expense which they incur in providing telephones and equipment in hotel rooms, operating the PBX switchboards through which the lines in the hotel are connected with the trunk lines of the telephone company, paging guests, taking messages and performing various other services generally described as "secretarial". These service charges are billed to guests by the hotels as a separate item on their hotel bills and are retained by the hotels (R. 61). The hotels also charge their guests the exact amounts of the charges of the telephone company for their respective calls, for which telephone charges the telephone company bills the hotels as subscribers, just as it bills other subscribers. The telephone company does not bill the guests but looks to the hotels for payment (R. 61).

It is alleged that the collection of these service charges by the hotels has violated Section 203 of the Act since February 15, 1944, on which date it is contended that there became effective a new tariff schedule filed with the Commission by the telephone company, which provides:

> "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club, in addition to the message toll charges of the Telephone Company as set forth in this tariff."

Notwithstanding that the hotels are not carriers and that Section 203, by its terms, applies only to carriers, and notwithstanding that the service charges collected by the hotels are retained by them and are not in any way remitted to or received by the telephone company, which receives only its tariff rates, the complaint alleges that

"*each* of the defendants has illegally continued and is illegally continuing to charge, demand, collect, or receive surcharges or service charges for and in connection with interstate and foreign message toll telephone communications * * *." (R. 10)

The hotels, by their answer, denied any illegality on their part in collecting their service charges, denied the validity of the tariff schedule or that it ever became legally effective, denied that their service charges were subject to the provisions of the Communications Act of 1934 or the jurisdiction of the Commission or that they could be regulated in any way by tariffs filed by the telephone company with the Commission, denied the enforceability of the tariff schedule against them, and denied the jurisdiction of the court to issue the injunction prayed for against the hotels (R. 42-45).

The telephone company, by its answer, denied unlawful conduct on its part (R. 47-50).

A motion by the Commission for a temporary restraining order was denied (original record 112, omitted in printing) and the case was tried before District Judge O'Donoghue without a jury.

The Services and Service Charges of the Hotels*

In the lobbies or other accessible locations of all of the defendant hotels, telephone booths have been installed and are available to persons in the hotels, by means of which calls can be made without involving the services of the hotels and their personnel. Charges for these calls are paid directly to the telephone company through coin boxes and are at the tariff rates of the telephone company without any additional charge being made or collected by the hotels (R. 62).

* At the trial of the case on April 26 and 27, 1944, the evidence was limited to the situation at one hotel, namely, The Shoreham, and it was stipulated that the testimony in regard to the facts at the other hotels would be substantially the same (R. 101, 169).

However, the hotels, as a part of their hotel service to their guests, have made it possible for guests to make and receive telephone calls in their rooms by having telephones installed therein connected with the so-called PBX switchboards of the hotels and have also customarily provided numerous message and secretarial services to their guests in connection with telephone messages (R. 57, 60). The telephone company, by regulation, refuses to permit any telephone equipment not procured from it to be connected with its trunk lines, and therefore the telephone instruments in the hotel rooms and the wiring therefor, as well as the PBX switchboard through which the connection is made, must be procured from the telephone company (R. 132, Finding 6, R. 57) although there is other equipment that might be used (R. 132).

The telephone equipment of a hotel consists basically of a private switchboard, known as a PBX board, and extension lines from the switchboard to the rooms, with telephone instruments at the end of each extension line. The trunk lines of the telephone company come to the switchboard and there connect with the hotel's equipment (R. 98). There is various other auxiliary equipment, and the equipment of the Shoreham, which is typical, was described by a witness as follows:

> "The Shoreham has a 6 position switchboard with 39 trunk lines, 2 auxiliary lines, 855 stations, 204 directory listings, 2 mine sets, 2 wiring plans, 8 buzzer circuits, 4 gongs, 29 bells, and a 4-line conference equipment, one booth, 2 additional stations, one lamp indicator, 8 operator sets, 11 long distance terminal loops or trunks, 7 wiring plans #203 and 600 feet of mileage for an off-premise station." (R. 102)

The amount and type of equipment in a hotel is entirely a matter of the hotel's choice (R. 128).

The equipment in the hotel is exclusively under the management and control of the hotel, and is manned by employees of the hotel (R. 128). The cost of the equipment is borne by the hotel in the form of a monthly charge paid

to the telephone company for use of the equipment, and the employees who man the equipment are paid by the hotel (R. 58, 128). Indeed, the telephone company by a tariff provides "All operating at the subscriber's premises must be performed at the expense of the subscriber—" (R. 220). This cost is substantial, the cost to the Shoreham in 1943 being $8,680.10 for use of the equipment, and $21,895.62 for payroll (R. 162).

The telephone equipment in the hotel, beginning with the switchboard, is self-contained, needs no outside service or operator (R. 131) and the service of the telephone company is required only when a call goes outside the hotel, that is to say, on the exterior side of the switchboard (R. 131).

The hotel subscribes to and receives from the telephone company the usual telephone service which is furnished to any business establishment, office, or other subscriber having a private switchboard (R. 128). This service is known as Private Branch Exchange, or PBX, service. There is no difference between the private switchboard installations in, and the service rendered to, hotels and the installations in, and the service rendered to, any private switchboard subscriber, either in available equipment and the charges therefor, or service rendered and the charges therefor (R. 128).

In addition to procuring and paying for the interior telephone equipment, and paying for the operators who man it, the hotel furnishes a variety of services to guests who use the telephones. These can be described best as secretarial services and are comparable to the services rendered by a secretary in a private office (R. 60, 164). As examples, the hotel operators will place and complete long distance calls for a hotel guest (R. 164), thus permitting the guest to go about his business until the called person is ready. This may take several hours in the case of a call to a distant phone when the circuits are busy (R. 161). Incoming messages are received during a guest's absence and memoranda of them left for him (R. 165). Outgoing

messages are transmitted for a guest who will be absent at the time the called person is reached or who has not the time or inclination to deliver them personally. Guests may leave word where they will be at a designated time and calling persons are given this information by the hotel operators. Guests who may not be at the telephones in their rooms are located by hotel employees and called to the phone (R. 165). Guests who are not even in the hotel when an incoming call is received will be reached where possible and advised of calls (R. 165). Guests wishing telephone service suspended for a period are given this protection (R. 166), and guests may advise the hotel operator that they will receive calls only from designated people and the operator suspends all other calls (R. 166). The services of this nature are manifold (R. 165).

The telephone company is not permitted under its tariffs to render these services which are rendered by the hotel (R. 59, 209, 210, 129). Its tariff provides

> "14. The Company will not transmit messages * * *. Employees of the Company are forbidden to accept either oral or written messages to be transmitted over the lines of the Company." (R. 230)

To reimburse itself for the cost of the facilities furnished and services rendered to their guests, it has long been the practice in the hotel to make a service charge to their guests. This charge has been ten cents per toll call where the telephone tariff charge is one dollar or less, ten per cent of the telephone tariff charge where such charge is more than one dollar, with a maximum charge of three dollars per call (R. 150).

The guest is also charged the regular tariff rate which the hotel pays to the telephone company for the toll call (R. 60).

The telephone company has nothing whatever to do with the charges made by the hotel to its guests (R. 131). It looks to the hotel to pay the telephone bill based on the tariff charges, and knows nothing of what the hotel may collect (R. 120). The telephone company gets no part of the charge collected by the hotel from its guests (R. 120).

The Proceedings Before the Federal Communications Commission

The tariff provision of the telephone company upon which this action rests was filed following and in supposed compliance with an order made by the Commission in a proceeding conducted by it.

The Commission's report indicates that it was led to its conclusion by its conception of the policy which ought to be reflected in the Act rather than by an analysis of the statute itself. The Commission said:

> "If the collection of such surcharges were not subjected to regulatory control, a subscriber, or anyone else other than the telephone company, who is permitted by the telephone company to control access to the use of a telephone, could freely resell interstate and foreign telephone service, imposing any charges of his own on such use." (R. 26)

The Commission said there were three possibilities as to "responsibility for the surcharge"; either (1) that they are charges of the telephone company on the ground that the hotels are its agent for collection; (2) that the hotels are connecting carriers for hire and themselves subject as carriers to the Communications Act; or (3) that the hotels, as subscribers, receive telephone service "subject to such tariff provisions as may apply" (R. 27, 28). The Commission then found that the hotels "are agents of the respondents" (R. 29, 30), and that any charge for the services rendered by the hotels "must be properly shown in effective tariffs" filed by the telephone company (R. 30). The Commission expressly omitted any finding as to whether the hotels were connecting carriers (R. 30). But notwithstanding its finding that they were agents it found them to be subscribers (R. 30). And it concluded that the tariff of the telephone company which should be filed to show any service charges made by the hotels "may consist of a tariff regulation * * * which contains specific provisions with respect to the conditions upon which telephone service * * * is furnished * * * to hotels * * *." (R. 36)

The Tariff Schedule of the Telephone Company

It should be noted that the Commission's order did not require the telephone company to file a schedule which would attempt to prevent the hotels from making any charge whatever for their services but simply required it to file a schedule stating what service charge would be permitted.

However, on January 22, 1944, the Chesapeake and Potomac Telephone Company filed a tariff with the Federal Communications Commission, purporting to become effective February 15, 1944, which contained the following provision:

> "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff." (R. 62, 63)

The Institution of This Suit

Not only had the Commission's order not required the telephone company to file a schedule designed to bar any service charge by the hotels, but the Commission in its proceeding had made no investigation whatever of the services of the hotels or of the costs incurred by them for which their service charges were made.

Nevertheless, the ink was hardly dry on the telephone company's new schedule when the Commission, through the Attorney General, instituted this suit to enforce compliance with the schedule and to enjoin the hotels from making their service charges.

Not only this but the Commission asked that a temporary restraining order be issued forthwith, at once restraining the hotels from making their charges upon which for many years they had relied to reimburse themselves for the substantial expenses incurred by them. As has been said, this

temporary restraining order was denied and the case proceeded to trial on the merits.

The Decision of the District Court

The District Judge concluded that

> "from the facts in this case it appears that the telephone companies are not violating the tariff schedules at all, and therefore there is no remedy that should be granted at this time against the telephone companies for any acts of their own." (R. 54)

The Commission had based its decision upon its finding that the hotels were the agents of the telephone company and for this reason had ruled that they should make no service charges, except as provided for in schedules of the telephone company.

The District Court, however, overruled this conclusion and expressly found that the hotels were not agents of the telephone company (R. 63). The District Judge correctly said that the evidence

> "fails to show that these hotels are the agents of the telephone company. There was no written agreement to that effect introduced here; there was no oral agreement to that effect introduced here; and there is no testimony, written or oral, from which this Court could imply the existence of any agency in the hotels on behalf of or as agent of the telephone company." (R. 52)

Judge O'Donoghue ruled that "the hotels are subscribers." (R. 52)

There is nothing in the statute that requires that the charges of subscribers for their services and expenses must be specified in or are to be controlled by tariffs of the telephone company. The District Judge, however, argued that if a hotel as a subscriber

> "undertakes, when the messages are going through, to render services to the guests, and then undertakes to

surcharge and make the charge go above, in amount, the tariff schedule, that would be doing indirectly what the telephone company is not allowed to do, and what the law, by its express and implied terms * * * did not mean to allow." (R. 53)

Since, as we shall argue more fully hereafter, Section 203 prohibits only carriers from collecting charges otherwise than strictly in accordance with their tariff schedules, and the District Court found that the "telephone companies are not violating the tariff schedules", it would seem to follow inevitably that there was and could be no violation of Section 203 at all, and that the action should have been dismissed.

Nevertheless, on the ground that "the hotels know what they are doing" and despite the fact that they are not carriers or agents of the telephone company, that the tariff is not theirs and that the statute contains no words or prohibition directed to subscribers, the District Court concluded that

> "they (the hotels) are violating this tariff schedule of the Federal Communications Commission, they are violating the law, and violating the rules of the Federal Communications Commission, and should be enjoined accordingly." (R. 55)

In the conclusions of law the District Court stated the matter thus (R. 66):

> "9. The collection by defendant hotel companies from users of interstate and foreign message toll telephone service of an extra charge, or surcharge, in addition to the regular tariff charges specified in the effective and applicable tariff schedules of defendant telephone companies on file with the Federal Communications Commission, and the Federal tax on such service, is contrary to the above tariff regulation. The collection by defendant hotel companies of any such surcharge is therefore illegal and should be enjoined. The defendant telephone companies are not violating said

tariff regulation by any act or omission of their own, and are not responsible for the violations being committed by the hotels."

Other Related Proceedings

The conclusions of law of the District Court refer to e pendency of a three-judge court proceeding (R. 67). lthough not fully set out in the printed record, we think e Court should be informed of this and other proceedgs which are pending.

(1) Upon the issuance by the Commission of its order, rsuant to which the telephone companies filed their tariff hedule, the hotels instituted a suit in the District Court, provided in Section 402 of the Act, to annul the order the ground that it was invalid and based upon errors of w. Because of the bringing of the present action to enrce compliance with the tariff filed pursuant to the order, e hotels' suit has not been brought to trial.

(2) When the tariff schedule was filed by the telephone mpany, the American Hotel Association, on behalf of s members, including the hotels here, petitioned the Comission to enter into an investigation of its reasonableess and legality and to suspend its operation pending ch investigation, as the Commission had power to do nder Section 204 of the Act. This the Commission deined to do. Thereupon the American Hotel Association ed a formal complaint with the Commission alleging that e new provision in the tariff schedule was unreasonable, scriminatory and unlawful and asking an investigation, t at the same time asserting that the tariff was illegal ecause it purported to regulate charges of hotels for their rvices which were not within the purview of the Act nor bject to the Commission's jurisdiction. Action on that mplaint has been held in abeyance pending the final desion on the jurisdictional question in this suit.

(3) Two other suits to enforce compliance with similar hedules of the American Telephone & Telegraph Com-

pany and its corresponding local affiliates have been instituted by the United States at the request of the Commission—one in the United States District Court for the Southern District of New York, and the other in the United States District Court for the Northern District of Illinois. The facts in these two other cases, while in large part similar to those present here, differ in certain important respects, notably, that the schedules there involved were not filed in supposed compliance with any order of the Communications Commission and that the legality of the schedules was challenged on the ground that they had not been filed in accordance with the requirements of the Act. In the New York case the District Court has rendered a decision in favor of the Government and an appeal has been taken to this Court. As yet this Court has not noted probable jurisdiction, *Hotel Astor, Inc. et al.* v. *United States of America, et al.*, No. 823. The Illinois case has been argued in the District Court but no decision has as yet been rendered.

Specification of Errors

The appellants intend to urge the following assigned errors (R. 291-298):

1. The Court erred in concluding as a matter of law that,

> "The tariff regulation with respect to interstate and foreign message toll telephone service filed with the Federal Communications Commission by defendant The Chesapeake and Potomac Telephone Company on January 22, 1944, to be effective February 15, 1944, and formally concurred in by defendant American Telephone and Telegraph Company, providing that 'Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company' as set

forth in its tariffs, is a legally effective tariff regulation under the provisions of the Communications Act of 1934, as amended, applicable to interstate and foreign message toll telephone service to or from telephone instruments located on the premises of defendant hotel companies. This tariff regulation is binding both on defendant telephone companies and on each of the defendant hotel companies." (Concl. of Law 8.)

2. The Court erred in concluding as a matter of law that,

"The collection by defendant hotel companies from users of interstate and foreign message toll telephone service of an extra charge, or surcharge, in addition to the regular tariff charges specified in the effective and applicable tariff schedules of defendant telephone companies on file with the Federal Communications Commission, and the Federal tax on such service, is contrary to the above tariff regulation. The collection by defendant hotel companies of any such surcharge is therefore illegal and should be enjoined. * * *" (Concl. of Law 9.)

3. The Court erred in concluding as a matter of law that,

"Any questions as to the justness and reasonableness of the above tariff regulation should be first submitted to the Federal Communications Commission for its determination under the Communications Act of 1934, as amended, and any such questions may be properly submitted to a Court, only after a prior determination by that Commission." (Concl. of Law 10.)

4. The Court erred in concluding as a matter of law that,

"A permanent injunction shall issue restraining the defendant hotel companies, and each of them, and all persons acting under the authority or control of each of them, including their officers, agents, and servants, from charging, demanding, collecting, or re-

ceiving any charge for and in connection with any interstate or foreign message toll telephone service to or from the premises of defendant hotel companies, other than the message toll telephone charges set forth in the applicable and effective tariff schedules of defendant telephone companies on file with the Federal Communications Commission, and the applicable Federal taxes." (Concl. of Law 14.)

5. The Court erred in concluding as a matter of law that,

> "The surcharges being collected by defendant hotel companies from users of interstate and foreign message toll telephone service to and from the premises of defendant hotels are charges for and in connection with interstate and foreign telephone toll communication service, within the meaning of the Communications Act of 1934, as amended." (Concl. of Law 6.)

9. The Court erred in finding as a fact that,

> "The effective tariff schedules of defendant telephone companies on file with the Federal Communications Commission for message toll telephone service apply to interstate and foreign message toll telephone service between all stations located on the premises of defendant hotels, including PBX extension stations, and telephone stations located outside the District of Columbia. The tariff schedules of defendant telephone companies on file with the Federal Communications Commission include the following effective provision, which is applicable to all of their interstate and foreign message toll telephone service:
>
> > 'The toll service charges specified in this tariff are in payment for all service furnished between the calling and called telephones.' " (Finding 8.)

10. The Court erred in failing to find as a fact and to conclude as a matter of law that the tariff schedules of defendant telephone companies on file with the Federal Communications Commission for message toll telephone

service apply only to service beyond the PBX switchboards of the defendant hotel companies.

11. The Court erred in failing to find as a fact that the provision that,

> "The toll service charges specified in this tariff are in payment for all service furnished between the calling and called telephone"

applies only to telephone service beyond the PBX switchboards of the defendant hotel companies and should be so interpreted.

12. The Court erred in failing to find as a fact that the additional charges made by the defendant hotels to their guests when such guest makes a toll telephone call are charges for the services described in the 13th finding of fact of the Court, which the defendant hotel companies render or are prepared to render to their guests.

13. The Court erred in finding as a fact that,

> "The surcharges being collected by defendant hotel companies are charges imposed against the users of interstate and foreign message toll telephone service. They are made only when such service is used, and they are a part of the charge made to the users of interstate and foreign message toll telephone service in connection with such use. These surcharges are collected by the defendant hotel companies in connection with interstate and foreign telephone toll communication service." (Finding 23.)

14. The Court erred in holding "that the Federal Communications Commission likewise had jurisdiction of the matter of the tariff schedules and so on", and in failing to hold that the Federal Communications Commission had jurisdiction only to the extent that the tariff schedules were valid. (Tr. P. 348)

15. The Court erred in holding that,

"Any relief along the lines of the tariff schedules that the hotels here may wish, or that the telephone companies here may wish, should be taken up before the Federal Communications Commission." (Tr. P. 348)

16. The Court erred in holding that,

"* * * if someone who has gotten telephone facilities as a subscriber, from the telephone company —and they have gotten those facilities for their own benefit, to accommodate their guests in the hotel— undertakes, when the messages are going through, to render services to the guests, and then undertakes to surcharge and make the charge go above, in amount, the tariff schedule, that would be doing indirectly what the telephone company is not allowed to do, and what the law, by its express and implied terms, and by the regulations of this Commission, and its orders, did not mean to allow." (Tr. P. 353)

17. The Court erred in holding that the defendant hotel companies are,

"* * * violating this tariff schedule of the Federal Communications Commission, they are violating the law, and violating the rules of the Federal Communications Commission, and should be enjoined accordingly." (Tr. P. 356)

18. The Court erred in holding that,

"The Court will grant an injunction restraining the hotels from adding these surcharges to the bills of the guests of the hotels, in addition to the regular charge for the interstate toll charges." (Tr. P. 356)

19. The Court erred in holding that the tariff schedules and the tariff regulation contained therein, filed January 22, 1944, by the Chesapeake and Potomac Telephone Com-

pany, purporting to become effective February 15, 1944, were valid.

20. The Court erred in failing to hold that the tariff schedule and the tariff regulation contained therein filed on January 22, 1944, by the Chesapeake and Potomac Telephone Company, purporting to become effective February 15, 1944, were not valid in so far as they attempt or purport to prevent the defendant hotel companies from making a charge for hotel services rendered.

21. The Court erred in failing to conclude as a matter of law that the tariff schedule upon which this action was based was illegal, invalid and unenforceable in that it represented an attempt of the defendant, the Chesapeake and Potomac Telephone Company, to regulate the charges of the defendant hotel companies to their guests for hotel services, in that it failed to conform to the provisions of Section 203 of the Communications Act of 1934, and in that by it the said telephone company illegally attempted to make the furnishing of telephone service to subscribers conditioned upon the conduct by said subscribers of their own business activities.

22. The Court erred in failing to find as a fact that the PBX switchboards, the extension stations and connecting lines within each hotel constitute self-contained systems for internal communication.

23. The Court erred in failing to find as a fact that the defendant hotel companies specify the equipment they require, that other equipment is available and could be procured were it not for the refusal of the telephone company to make connection with any equipment not rented from it.

24. The Court erred in failing to find as a fact that the telephone company receives no part of the service charges made by the defendant hotel companies.

25. The Court erred in failing to hold as a matter of law that the provisions of Section 203 of the Communications Act of 1934 imposed no duties and no prohibition upon the defendant hotel companies.

26. The Court erred in finding as a fact and holding that the defendant hotel companies did or could violate the Communications Act of 1934 and in holding that an injunction should issue against them while finding that the Chesapeake and Potomac Telephone Company which was and is a common carrier subject to said Act did not violate the provisions thereof.

27. The Court erred in holding that the charges made by the defendant hotel companies to their guests are in violation of the tariff schedule filed January 22, 1944, by the Chesapeake and Potomac Telephone Company, purporting to become effective February 15, 1944.

28. The Court erred in entering its order of June 8, 1944, enjoining and restraining the defendant hotel companies and each of them from charging, demanding, collecting or receiving any charge for and in connection with any interstate or foreign message toll telephone service to or from the premises of the defendant hotel companies other than the message toll telephone charges set forth in the applicable and effective tariff schedules of the defendant telephone companies on file with the Federal Communications Commission and the applicable Federal taxes.

29. The Court erred in failing to dismiss the suit and in denying the motion of defendant hotel companies for such dismissal.

Summary of Argument.

POINT I. The only tariff schedules for enforcement of which an action may be maintained under Section 401 of the Communications Act of 1934 are schedules required to be filed by Section 203 of that act. Such schedules are limited to schedules specifying the charges collected and received by common carriers for wire communication service furnished by them and regulations affecting such charges. The requirements and prohibitions of Section 203 are addressed only to carriers. Schedules attempting to specify or regulate the charges of others than carriers or the charges of carriers or others for services other than wire communication gain no binding effect by being filed with the Commission and may not be enforced in an action under Section 401.

POINT II. There is no basis under the Communications Act of 1934 for this suit since the tariff schedule sought to be enforced, as interpreted by the lower court, is not a schedule required or permitted by Section 203 to be filed or enforced thereunder in that it does not specify or affect the charges of the telephone company but attempts to specify or regulate the charges of the hotels, which are not carriers, for their services which are not communication under the Act.

The argument under this and following points proceeds on the assumption that the schedule is to be construed as prohibiting the hotels from collecting their service charges from their guests. The schedule does not in any way specify or affect the telephone company's own charges collected or received by it.

The hotels' service charges are collected by the hotels and retained by them. The hotels are not agents of the telephone company and therefore their collection of the charges is not to be deemed collection by or for the telephone company. The hotels' service charges could therefore be charges collected by carriers only if the hotels were themselves carriers or connecting carriers of the telephone company, and their charges were for communication service.

The hotels are not carriers under the Communications Act since they do not offer communication service as common carriers to the general public. Their services are provided only for their guests. Neither the Commission nor the lower court found the hotels to be carriers. The lower court found that they were subscribers. Even if the hotels were connecting carriers, the schedule would not be enforceable against them because it purports to specify charges made by them without their consent or concurrence.

Moreover, the charges of the hotels are not charges for communication service subject to the Act. The hotels' services are essentially secretarial services which the telephone company expressly declines to furnish as communication services.

The manner in which the hotels arrive at their service charges and their method of billing do not bring the charges within Section 203. The fact that the hotels, in the exercise of their discretion in the conduct of their hotel business, collect their charges from guests who make toll calls from their rooms and base the amounts of their charges on the amounts of the telephone company's charges does not convert the hotels' services into communication services or cause their charges to be charges for such services by a common carrier. The situation is similar to that where hotels procure railroad tickets for guests and make a service charge based upon the price of the tickets. The hotels do not thereby become railroads and their service charges are not charges for railroad transportation.

POINT III. The telephone company's schedule as interpreted by the court below cannot be defended and enforced under Section 203 on the ground that it is a regulation of its service.

It is not a regulation to be enforced under Section 203 since it does not affect the charges collected or received by the telephone company.

It is an invalid regulation in that it does not protect any real interest of the telephone company but attempts

to control the charges made by the hotels as customers for their own services. Such lawful regulations or conditions as a carrier may attach to the rendering of its service are limited to those which are reasonably necessary to safeguard its equipment and prevent abuse of its services and facilities. A schedule cannot be defended as a proper regulation, which, like the one here involved, does not in any way affect or protect any interest of the telephone company but attempts to control the business of subscribers. The services of the hotels for which they make their charges are not in any sense services rendered by the telephone company.

The schedule is invalid as a regulation of the conditions on which the telephone company provides service in that it amounts to a denial of the obligations of the telephone company as a common carrier. This is so because a common carrier is obligated to serve all who call upon it and are ready and willing to pay its customary reasonable charges, and a common carrier may not deny its service to a patron because of what the patron does in the conduct of its own business. For these reasons, the schedule is unenforceable and prior recourse to the Commission is not necessary.

POINT IV. The fact that the lower court considered that it was contrary to the public policy for the hotels to make service charges does not bring them within the provisions of the statute.

POINT V. The enforcement of the schedule as interpreted by the Commission and the lower court would take the property of the hotels without just compensation in violation of the Fifth Amendment, since it assumes that they will render their services, which involve expense to them, but would prevent them from obtaining compensation therefor.

POINT VI. The schedule is open to the construction that it prohibits only the making of additional charges for the telephone company's service. Since the hotels do not do

this but charge their guests the telephone company's rates, there is no violation of the schedule as so construed and the suit should be dismissed.

POINT VII. Since the prohibitions of the statute run only to carriers and since the lower court found that the telephone company was not violating the act and should not be enjoined, there was no violation at all and it was error to issue an injunction against the hotels. Section 411(a), while permitting the joinder of interested parties other than carriers, does not permit a decree against the former except to the extent that a decree is entered against the carriers.

POINT VIII. This case is distinguishable from the decisions relied upon by the Commission. Such decisions rested upon findings that the hotels were agents of the telephone company and upon tariff schedules expressly so providing.

CONCLUSION. There are three possible conceptions of the relationship which might exist between the hotels and the telephone company: that of agent and principal, that of connecting carriers, and that of subscriber and carrier. The lower court found that the hotels were not agents and no review of this finding has been sought. It is amply supported by the evidence. Neither the lower court nor the Commission found that the hotels were connecting carriers. The lower court found that the hotels were subscribers to the telephone company's service. The schedule attempts to specify or regulate the charges to be made by the hotels. There is no provision in the statute authorizing a schedule of a carrier attempting to regulate the charges of a subscriber for its services in its own business. The schedule here does not in any way affect the charges collected or received by the telephone company. Therefore, the schedule is not enforceable under Section 203 and the suit should be dismissed.

ARGUMENT

POINT I

The only tariff schedules for enforcement of which an action may be maintained under Section 401 of the Communications Act of 1934 are schedules required to be filed by Section 203. Such schedules are limited to schedules specifying the charges collected and received by common carriers for wire communication service furnished by them and regulations affecting such charges, and do not include schedules specifying or regulating the charges of customers or others for their services. The requirements and prohibitions of Section 203 are addressed only to carriers.

This is a statutory action. The right to maintain it does not derive from general principles of the common law or of public policy. Unless the facts establish a case within the four corners of the Communications Act there has been no violation and the decree was error. This is so whatever reasons of public policy may be thought to exist for a statute which would bring the service charges of the hotels within the application of the Act and the jurisdiction of the Commission. It is essential, therefore, as a preliminary to a discussion of the case, to examine the statute with some care to see just what it does and what it does not provide.

The complaint alleges that Section 203 has been violated. The text of Section 203 is set out in full in the Appendix. The provisions pertinent here are paragraphs (a), (c) and (e), which are as follows:

> "(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission

and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

"(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

"(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25

for each and every day of the continuance of such offense."

The two most important paragraphs of this section for present purposes are (a) and (c).

A. As to Paragraph (a) of Section 203

The first important point with regard to paragraph (a) is that its prohibitions are addressed only to common carriers. It is "*every common carrier*" which is required to file schedules.

In the second place, the only schedules which "every common carrier" is required to file are schedules "showing all charges *for itself* and *its connecting carriers for* interstate and foreign *wire* * * * *communication* * * * and showing the classifications, practices, and regulations *affecting such charges.*" This does not mean the charges of or for its subscribers. Nor does it mean charges for goods or services other than "wire communication."

It must follow that schedules, although filed with the Commission, which attempt to specify the charges of others than carriers or charges for goods or services other than "wire communication" are not schedules required by paragraph (a) to be filed or required by paragraph (c) to be strictly observed; they gain no sanctity or enforceability by being filed with the Commission. Whatever their effect may be as the basis of a contract or otherwise, failure to observe them is not a violation of Section 203 to be enjoined in an action under the provisions of the Communications Act.

As to "regulations", the language of paragraph (a) makes it clear that it is only "*regulations affecting such charges*" which may be shown in schedules filed with the Commission and enforceable under the Act. A carrier may have various regulations for a violation of which it may or may not have means of redress but if the regulations do not "affect" the charges of a carrier for wire communication, a breach of them is not unlawful under Section 203.

These conclusions find support in the administration of the Interstate Commerce Act, upon whose provisions the parts of the Communications Act here discussed were obviously modeled.

Thus, even where a carrier's tariff names charges to be collected by the carrier itself, if such charges are for services other than transportation, the Interstate Commerce Commission has held that the tariff should not be filed and is not enforceable by it under the Interstate Commerce Act. For example, in *Thompson* v. *Chicago, B. & Q. R. Co.*, 157 I. C. C. 775, the Commission ruled that the feeding of livestock in transit, although done by the carrier, "was not a service of transportation within the meaning of the act" and therefore the Commission could not entertain a complaint alleging the collection of excessive feeding charges under a filed tariff. The Commission said (p. 778):

> "The fact that the charges are published in a tariff on file with this Commission can not confer jurisdiction upon us where it has not been granted by Act of Congress."

To the same effect was the decision of the Interstate Commerce Commission in *Albany Packing Co., Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 245 I. C. C. 741, 744.

Much less are the provisions of a tariff enforceable by the Interstate Commerce Commission when they purport to fix the compensation to be collected by a party not a carrier, for services related to, but not themselves constituting transportation. Accordingly, in *Reciprocal Switching at Detroit*, 215 I. C. C. 284, the Commission held that a charge made by one, not a carrier, for the expense of labor in loading freight on cars, although a necessary preliminary to rail transportation, should not be specified in a tariff schedule filed with it, and was not a matter subject to the Interstate Commerce Act and the Commission's jurisdiction. The analogy to the present case is plain.

In *Refrigerator Car Mileage Allowances*, 232 I. C. C. 276, the Interstate Commerce Commission ordered stricken from its files a tariff schedule purporting to specify the charges that would be paid to private car lines, not owned by shippers, for the use of their cars, on the ground that although the cars were used for transportation, the tariff schedule did not relate to charges paid by shippers to carriers for railroad transportation.

B. **As to Paragraph (c) of Section 203**

It is plain that paragraph (c) in prohibiting a carrier from charging "a greater, less or different compensation * * * than the charges specified in the schedule then in effect" and from extending any privileges or facilities "except as specified in such schedule" has reference to the schedules required by paragraph (a) to be filed with the Commission. It is only if a schedule is such a one as to come within the mandate of paragraph (a) that departure therefrom can be a violation of paragraph (c).

The next feature of paragraph (c) which is important for the present case is that its prohibition of charging and collecting different compensation from the charges specified in a filed schedule, is addressed only to carriers. The words are "*No carrier*". By Section 153(h) the terms "common carrier" or "carrier" are defined as meaning "any person engaged as common carrier for hire, in interstate or foreign communication by wire". It is only such a person who violates Section 203(c) by collecting charges not specified in a tariff filed in accordance with paragraph (a).

It is significant that in connection with wire communication, Congress has not seen fit to extend the prohibition against departing from filed schedules to customers of carriers and others than carriers themselves, as it did with respect to railroad transportation by the Elkins Act (32 Stat. L. 847, U. S. C. Title 49, Secs. 41-43).

In the interest of a complete analysis, it should be remarked that while paragraph (a) of Section 203 refers to

"schedules showing all charges * * * for interstate and foreign wire * * * communication", paragraph (c) uses the words "compensation for such communication, or for any service in connection therewith". It is nevertheless clear that this means compensation which the "*carrier* shall * * * charge, demand, collect, or receive" and does not have reference to compensation charged, demanded, collected, or received by someone else, such as a subscriber. Moreover, the fact that it is only a carrier which is made subject to the prohibition of paragraph (c) together with the general context indicates that the phrase "for any service in connection therewith" has reference to the words "practices * * * affecting such charges" in paragraph (a). Obviously, "such charges" are the charges of a common carrier "for itself and its connecting carriers".

The point here urged is emphasized by examining the provisions relating to penalties for violations. Under the Elkins Act, shippers and others than carriers are made subject to penalties for acts which result in the payment by shippers of charges at variance with those specified in filed tariffs of the carriers. Under Section 10 of the Interstate Commerce Act itself, persons other than carriers may in certain circumstances become subject to criminal penalties for acts which result in transportation being performed "at less than the regular rates then established". But in the Communications Act the only penalty provision pertinent here is paragraph (e) of Section 203, and this is applicable only to carriers.

It is recognized, of course, that Section 411(a) provides that

> "In any proceeding for the enforcement of the provisions of this chapter * * * it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practice under consideration. * * *"

It is under this provision that the hotels were named as defendants in the complaint (Complaint, paragraph 4, R. 3). But this does not mean that any "persons interested in or

affected by the charge'' can themselves violate the Act independently of the carrier, or that they can be brought in otherwise than in aid of a proceeding involving a violation by a carrier of some provision of the Act.

This is confirmed by the remainder of Section 411(a) which provides that

> "decrees may be made with reference to and against such additional parties in the same manner, *to the same extent*, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

Plainly under this provision, if no decree is warranted against a carrier then there can be none against "such additional parties".

It remains to review the circumstances here in the light of this analysis of the pertinent provisions of the Act.

POINT II

There is no basis under the Communications Act of 1934 for this suit, since the tariff schedule sought to be enforced, as construed by the Commission and the court below, is not a schedule required or permitted by Section 203 to be filed and enforced thereunder, in that it does not specify or affect the charges of the telephone company, but attempts to specify or regulate the charges of the hotels which are not carriers for their services which are not communication under the Act.

For convenience, we repeat the tariff provision of the telephone company to enforce which this suit has been brought. It reads as follows:

> "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition

that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff."

A statement that no charge shall be made is as much a specification of the amount of a charge as if a figure had been named, or else it is a regulation affecting a charge. As we shall argue under a later point, it is open to doubt whether the telephone company's schedule is properly to be construed as attempting to specify that as a condition of receiving toll telephone service for its own use and to place at the disposal of its guests, a hotel must forego making any charge whatever to its guests to reimburse or compensate itself for the expense it incurs and the service which it renders over and above the service of the telephone company in enabling its guests to make and receive toll calls in their rooms and elsewhere. However, whether or not the schedule should be so construed, this is the way it has been sought to be enforced in this suit. Therefore, except for the argument under Point VI we shall assume that the schedule, if valid and operative, would have this effect.

A. The schedule is unenforceable under Section 203 since it does not specify or affect the charges collected by the telephone company, but attempts to specify the charges of the hotels which are not carriers or connecting carriers but subscribers.

The tariff schedule does not attempt in any way to affect what the telephone company's own charges shall be or what it shall receive for its communication service. It receives its published toll charges and would continue to do so under this schedule. No part of the service charges collected by the hotels is in fact remitted to the telephone company. And since it has been correctly found by the court below that the hotels are not the agents of the telephone company in collecting the service charges, and no error has been alleged in this finding, it cannot be claimed

that on some principle of agency the hotels collect the service charges for the telephone company.

In short, this schedule is not a schedule of the telephone company specifying charges *"for itself"*. It attempts to specify what the charges of the hotels shall be for themselves.

If the hotels were "connecting carriers" within the meaning of the Act, the schedule might come within the terms of Section 203 in so far as this phase of the matter goes, as a schedule of the telephone company "showing all charges for * * * its connecting carriers."

The lower court, however, did not find that the hotels were "connecting carriers", nor base its conclusion upon any such assumption. On the contrary it found definitely that the hotels were "subscribers" (R. 52). Neither did the Commission find the hotels to be connecting carriers, but instead it expressly stated that it made no such finding (R. 30).

It is plain, moreover, that the hotels are not connecting carriers within the language and intent of the Act. To be a "connecting" carrier one must first be a "carrier". A carrier is defined in Section 153(h) of the Act (47 U. S. C. 153(h)), which provides:

> "'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, in so far as such person is so engaged, be deemed a common carrier."

Leaving until later the question whether the services for which the hotels make their charges are "communication by wire", they are not engaged in furnishing these services as "a common carrier".

A common carrier is one who offers his services to the general public and is bound to make those services available to anyone seeking them and willing to pay the

carrier's customary and reasonable charges therefor. *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570 (1924); *Matter of Motor Haulage Company* v. *Maltbie*, 293 N. Y. 338 (1944).

The fact that the hotels are themselves engaged in a public calling must not be allowed to cause confusion on this point since the undertakings of the hotels in their field are quite distinct from the public undertaking which makes one a common carrier under the Communications Act. For the purposes of this Act, the test is whether "wire communication" is offered to the general public, and must be supplied on paying only the charges for wire communication. The hotels do not offer to the general public the privilege of telephoning from or receiving telephone calls in hotel rooms. They do not offer to page any and every one, to take messages for anybody, to pay the telephone company's charges for toll calls for anyone that asks for it and to assume the risk of collecting later. These are services which the hotels make available only to their guests. Before a man may use a telephone in a hotel room he must have been accepted as and have become a "guest" of the hotel. This involves registration, becoming liable for the hotel charges for the room, agreeing to the hotel's regulations, etc. The hotels are not common carriers of telephone service.

It follows that the hotels are not "connecting carriers" and that the telephone company's schedule, in attempting to specify what the charges of the hotels shall be, is not a schedule showing charges either "for itself" or "for * * * its connecting carriers".

Hence on this ground alone the schedule is not one within the terms of Section 203 and is not enforceable in a suit under Section 401(c).

In support of this conclusion, we refer again to the decisions cited under the previous point wherein it was held that tariffs purporting to fix charges to be paid to persons who are not carriers are not properly filed with the Interstate Commerce Commission and are not en-

forceable under the Interstate Commerce Act, *Swift & Co. v. United States*, 316 U. S. 216 (1942)—charges of a stockyards company. *Reciprocal Switching at Detroit*, 215 I. C. C. 284—charges of a carloading concern; *Refrigerator Car Mileage Allowances*, 232 I. C. C. 276—charges of non-carrier private car companies.

B. Even if the hotels were "connecting carriers" the schedule would be unenforceable against them as an attempt to specify their charges without their consent or agreement.

Even if the hotels were carriers and could, therefore, be considered "connecting carriers" of the telephone company, it is obvious that they could not be bound by a schedule filed by the telephone company purporting to cover their services unless they had concurred in or agreed to such schedule. Section 203(a) provides for schedules for communication between points on a carrier's system and "points on the system of its connecting carriers" only "when a through route has been established", which necessarily implies agreement between the carriers. This contention is fully supported by decisions under the Interstate Commerce Act. In *Wheelock* v. *Walsh Fire Clay Products Company*, 60 F. (2d) 415, the Circuit Court of Appeals for the Eighth Circuit held that "the initial carrier did not have it within its power by making its own tariff subject to the formula provided in the Jones Tariff, to modify or amend the applicable tariffs of the connecting carriers, nor to force upon them rates named in tariffs to which they were not parties". To the same effect are *New York, New Haven & Hartford R. R. Co.* v. *Platt*; 7 I. C. C. 323; *Hull Co.* v. *Southern Railway Co.*, 24 I. C. C. 302.

In the present case the telephone company has by *ex parte* action attempted by its schedule to eliminate charges for services made by the hotels. But the hotels have not agreed to or concurred in the schedule. The schedule is, therefore, unenforceable against them.

C. The schedule is unenforceable under Section 203 since it attempts to specify or regulate the charges for services which are not wire communication by a carrier subject to the Act.

As we showed in the general discussion of the law under the first main point, schedules attempting to specify charges for services other than communication or transportation, even if they are charges of a carrier, are not properly filed with the Commission under Section 203 and such schedules are not enforceable under the Act. *Thompson* v. *Chicago, B. & Q. R. Co.*, 157 I. C. C. 775—charges for feeding livestock; *Southern Pacific Co.* v. *United States*, 272 U. S. 445 (1926)—charges not for common carrier service to the public but for special transportation for the government. And a provision not affecting charges for common carrier service does not become binding because published in a tariff schedule. *Pacific S. S. Co.* v. *Cackette*, 8 F. (2d) 259 (C. C. A. 9th, 1925)—limitation of time for filing claim.

The services for which the hotels make their charges are in no sense "wire communication" within the contemplation of the statute, but are essentially hotel services to hotel guests.

A hotel is not engaged in railroad transportation because its porter will buy tickets and make reservations for guests. It does not operate a theatre because it will procure theatre tickets. Nor does it engage in wire communication because its operators will look up numbers and place calls with the telephone company.

A hotel's services have been described as generally "secretarial" in character (R. 165). Witness Moore testified as follows regarding the services for which the hotels make their charges and the reasons therefor (R. 164-165):

> "Q. Will you state the secretarial services rendered by the employees of the hotel?
>
> A. Well, we will start with the guest going to his room and wanting to use the telephone for a long distance call. He can pick up the instrument and ask the operator to place a call for him to a city like New York

or Chicago, such-and-such a number, and call such-and-such a person. If he doesn't request it, he put through to the telephone operator, the toll telephone operator in the telephone company, our operator staying on the line to see that the call is properly handled and that the proper room number is (fol. 397) given, and she stays on the line until that call has started.

After the call is disconnected, she gets from the telephone company the proper charges, the name of the parties called and calling, and the time and the amount of the call, and the tax, and the service charge is added. And that is charged to the account.

If a guest wishes, and the majority of them do, that whole transaction is carried on by our telephone operator at the switchboard, and the guest merely calls and says, 'Get me Mr. Jones at such-and-such a number in New York'. She handles the call and he can go about shaving or getting dressed or having his breakfast, or what-not, and when that call is ready she rings the room phone and says, 'We are ready with New York'.

The other services that we render would go into almost the same category as those of a large office, where you have a number of offices and a central switchboard, and that operator being employed for that suite of offices. We have to take as many office messages as this man was getting back home. If he goes downtown, he calls back to the hotel and leaves messages that he is going to be met, or wants to meet somebody at a certain place, if they call in. And it just goes on all day until our switchboard is loaded with messages; and for that reason, in addition to operators, we have to keep a chief operator and supervisors (fol. 398) to handle these messages, which is, in our opinion, secretarial service. We think that our telephone switchboard is rendering more secretarial service than the average office renders in any place in the city.

I can give you a quick example. A man will try and try to get an office on the telephone downtown, and he can't make it, he has an appointment and has to leave, and we carry the call out, and when we can get it we tell them he is on his way.

The same is true with a long distance call. He tries to get his home office and can't reach it, and has an appointment with one of the Government departments, and leaves word with the operator to call them and give them a message, and she repeats that message to the home office.

So all day long our operators are performing the work that an operator would do in a large office or Government department.

Q. Do the operators receive messages for the guests and transmit them to the guests?

A. Yes, we receive and write down, and put into the mail box, messages for guests. We ask the question, 'Do you wish to leave a message?' If they say 'Yes', we write it down and put it in the mail box. Those messages, of course, are in a great number of cases of great importance, and the party must be reached. It sometimes is a matter (fol. 399) of dollars and cents, and also health, and messages from home, and so forth. Long distance calls come in while a man is busy in one of the departments, and we have to handle that message and see that he gets it when he gets home.

It is one of the most important things that the telephone department does, to see that those messages are properly written and are handed to the guest or reach the guest.

Q. If the guest happens to have left his room, either to go to some other part of the hotel—the dining room or barber shop or some other branch of the hotel—or outside of the hotel, does the employee of the hotel undertake to locate the guest and transmit the call to him?

A. Yes, that happens so often, now more than ever before because of the busy circuits. A man will place a long distance call and can't wait for it, he is going to the barber shop or going to have breakfast, and leaves word he will be in the dining room or in the barber shop, and there again the message is put up on the switchboard, and as soon as that call is completed he is sent for, paged or called to the telephone, and it is reported to him that his call is ready.

Q. And that applies also if they have left the hotel and gone to some other part of the city?

A. Yes. In the telephone department we get these calls up to that switchboard, and from that switchboard on we have to go to work and do all of this extra work to reach (fol. 400) parties making calls, and so forth. It really becomes quite a task, and one that we can be seriously involved in if we do not do it right. The matter of responsibility is there in the handling of messages, and so forth, and we have to have competent people in that department to handle them.

If I could just go back to the statement again about the charge in the accounting end of it, that is one reason that we set this up originally, and why hotels have always set it up, that the people that are using the telephone the most are those that demand the most service on this incoming and this secretarial service. So out of fairness, we have always placed the charge against those people."

To be sure, all of these things are related to the making and receiving of telephone calls by guests, but to hold that they constitute "wire communication" would mean that any business concern with a PBX board and with operators and secretaries that place and receive calls and make connections with the trunk lines of a telephone company is engaged in wire communication within the meaning of the Act. Obviously this is not the intention of the Act. The evidence here shows that monthly charges made to the hotels for equipment are the same as made to other subscribers having PBX boards, such as department stores, government departments, law offices, newspapers, courts—"any business subscriber that is of substantial size and has a lot of employees would have a private branch exchange". (R. 108) In each of those instances the board is operated by an employee or employees of the subscriber, not of the telephone company; the subscriber has complete control of the board, the number of extensions, and the number of employees, and connection is made with the telephone company only when the operator plugs into the line of the

telephone company from the PBX board. It is inconceivable that what all such firms, business houses and courts do is within the term "wire communication" by a carrier for the purposes of the Act. Their telephone equipment is an adjunct of their regular business. So, too, hotels do not make the furnishing of wire communication their business. They are innkeepers. Telephones in their rooms are hotel accommodations, like electric light and hot water, which in these days guests expect.

As a final answer to any suggestion that the services for which the hotels make their service charges constitute wire communication subject to the Act, we return to the point previously urged, that the hotels are not themselves carriers subject to the Act. For it is only wire communication by common carriers to which the Act applies and for which charges are to be specified in schedules filed with the Commission under Section 203.

Nor can the services of the hotels be said to constitute wire communication by the telephone company; since (a) it is the hotels which perform the services and they have been expressly found not to be agents of the telephone company; and, (b) the services are essentially secretarial services which the telephone company will not perform and by its schedules has expressly refused to perform (R. 128, 230).

Sight must not be lost of the fact that this same equipment is used for internal communication within the hotel as for outside calls and such internal communication is obviously not conducted by the telephone company nor is the hotel in providing the service a common carrier subject to the Act, *Chesapeake & Potomac Tel. Co.* v. *Manning*, 183 U. S. 238 (1901).

We do not overlook the provision which the telephone company inserted in its schedule reading (R. 59):

> "The toll service charges specified in this tariff are in payment for all services furnished between the calling and the called telephones."

But this cannot mean that the telephone company thereby extended its services to the instruments in the rooms

of hotels. For the telephone company could not reach the hotel rooms without the consent of the hotels. If this clause were interpreted as an undertaking by the telephone company to hotel guests to accept calls from or transmit calls to hotel rooms it would be an undertaking without power of fulfillment, since without the intervention of the hotels' employees and without the hotels' consent the calls could not be put through. Only if the hotels were agents of the telephone company could it be claimed that through their agency the telephone company could provide service to and from hotel rooms. But such agency is denied by the telephone company (R. 202), is disproved by the evidence and was found by the lower court not to exist (R. 52).

It is possible to conceive of a situation where a hotel for a rental or other consideration might allow the telephone company to come upon its premises, install such instruments in hotel rooms as it might desire, install wires to these instruments, put in a PBX board, and with its own operators operate the board, make connections, look up numbers, place calls and bill the guests directly for any calls made by them. In this event it might well be that the entire service from a telephone in a guest's room would be wire communication service by a common carrier (the telephone company) subject to the Communications Act and that the carrier's schedule might, and indeed should, specify the charges for all of the services rendered to the guests. This is in effect what does take place with regard to the coin telephones in hotel lobbies, which are placed there by the telephone company and operated by it and from which collection of charges is made directly by the telephone company, the telephone company paying the hotels rental for the space (R. 162).

There is reason to believe that some of the thinking on this subject, which is reflected in the decisions cited by the Communications Commission in its report (R. 27) and which are discussed in Point VIII hereafter, stems from an impression that such is the actual situation. For one of the earliest pronouncements on the subject of the relation of hotels to telephone services was an informal opinion

of the Public Service Commission of New York in 1920, in which the Public Service Commission asserted its jurisdiction over all charges for telephone service to and from hotel rooms in the following language:

> "If the proprietor of a hotel permits a public utility company to install its system upon the hotel property to reach telephone users in the hotel lobby and in guest rooms, a fair agreement should be made for such use of the premises, but the permission to use such hotel premises to install a telephone system does not change the nature of the service. It remains public service, subject to regulation, and such permission cannot transmute a hotel company into a public telephone corporation possessing the functions of such a corporation but free from its duties." (Op. Public Service Commission, 1920, 22 St. Dept. Rep. 540.)

While it is possible to conceive of such a situation, the evidence and findings are conclusive that it does not exist here. The hotels here do not permit the telephone company to come into their premises, install telephones in such rooms as the telephone company may elect, establish a PBX board and operate it with telephone company employees. On the contrary, it is the hotel which has the telephone instruments installed, decides how many it wants and in what rooms, pays for them, pays for the PBX board, employs and directs the operators on the board and all supervisors and others required for services within the hotel. The telephone company does not bill the guests but bills the hotel. There is no contract relationship between the telephone company and any hotel guests in so far as the circumstances here involved are concerned. This case, therefore, cannot be decided on the basis of any conception such as that here discussed and reflected in the informal opinion of the New York State Public Service Commission.

Rather, the situation here is analogous to that dealt with in *Warehouse Co.* v. *United States*, 283 U. S. 501 (1930), where it appeared that concerns engaged in the warehouse business performed various services in loading freight into

railroad cars and in making delivery of freight to consignees. In the court's opinion written by the present Chief Justice, the findings of the Interstate Commerce Commission and the court below with regard to the services rendered were described in the following language, which is significant, among other things, as bearing upon the claim that the telephone service afforded to guests in hotel rooms is service offered to the public (pp. 505-506):

> "Appellants' warehouses, while nominally open to the general public as railroad freight stations, are not in fact public stations, but are confined to the warehousing of merchandise for their patrons. The services which they perform in connection with loading and unloading of freight, including the sending of arrival notices to their patrons after receipt of notice of arrival from the railroad, the collection of freight charges, and other incidental matters, are in fact performed for the owners of the merchandise rather than for the railroads. While the contract warehouses are not owners of goods received or shipped, the dealings of the railroads are with them and not with the owners of the goods; and as to many of the inbound carload shipments, the contract warehouses are the only parties to whom delivery of the goods could be made as carload shipments, the real owners being concerns which ship carload merchandise to appellants for distribution by them in less than carload lots. The contract warehouses, being given dominion over the merchandise for transportation purposes, are to be deemed consignors of shipments from, and consignees of shipments to, their warehouses."

This court held that these services were services to the shippers as a part of the warehouse company's warehouse business and were not railroad services performed by the warehouse companies as railroads or as agents for the railroads. It therefore held that it was unlawful for the railroads to pay allowances to the warehouse companies out of the railroad rates and that the warehouse companies

must look for compensation to their own charges to their patrons.

Similarly the services of the hotels here are not wire communication by common carriers.

D. The manner in which the hotels arrive at their service charges and their method of billing do not make them charges to be specified in tariffs filed under Section 203.

It is apparent that this suit and the decision of the court below are the consequence of confusion of thought, resulting from the fact that the hotels, in the exercise of their business discretion as hotelmen as to the manner in which they shall bill for their hotel services, seek reimbursement for the expenses which they incur in providing various conveniences and secretarial services to their guests by making a service charge whenever a guest makes a long distance toll call and basing that service charge on the amount of the telephone company charge.

The lower court conceded the right of the hotels to obtain reimbursement for their expenses and compensation for their services. He suggested that they might curtail the services or increase their charges for rooms, food and drink (R. 54). Either of these suggestions supports the point urged here. For if the hotels may eliminate some of their services they are not carrier services subject to the Act, since such services cannot be refused at will. If the hotels may seek compensation in some other manner, this is because they are entitled to compensation in their own right and the customer has not paid them for their services in the rates paid to the telephone company.

However, the form of the charges and the method of billing does not convert the services for which the charges are made into wire communication under the Act.

If the hotels may charge for such services, then it becomes a matter of hotel business as to how they shall compute their charges and what method they shall employ to reimburse themselves. The evidence shows that the hotels have for years followed the practice of obtaining compensa-

tion for these various services by making service charges to guests who make telephone calls from their rooms (R. 159). This has worked satisfactorily. The hotels could, of course, as the lower court suggested, increase their room rates to make themselves whole. But this would result in compelling guests who do not use the telephone facilities and secretarial services to pay for them. To make charges when incoming calls are received, would subject guests to charges when they have no control over the calls and may not desire them. It was testified that the method employed seems reasonably fair and it does not deceive the guest by subjecting him to a hidden charge.

What the hotels do in relation to the telephone facilities and secretarial services which they provide is similar to what they do when a guest calls upon the hotel to arrange railroad transportation for him, so that he is saved the inconvenience of himself going to the ticket office. The hotels charge the guest the railroad fare paid for the ticket at the railroad's tariff rates. But the guest is also charged a service charge for the hotel service which may be based upon the price of the ticket. However, because this charge is made in connection with procuring railroad transportation, the service of the hotel does not become itself railroad transportation or subject to the railroad tariffs and to control by the Interstate Commerce Commission.

Nor are guests confused into thinking that the service charges made by the hotels are charges of the telephone company rather than charges of the hotels since they are shown separately on hotel bills and the telephone vouchers are available to guests (R. 155). There is not a scintilla of evidence that any guest has been misled or has considered that in paying the hotel charges he was paying an additional rate to the telephone company.

Similarly, the fact that the amounts of the service charges are determined in relation to the charges of the telephone company and do not reflect the variations in the extent of the services furnished by the hotels does not make them any less charges for the hotels' services. There are

many examples, such as tips and other service charges, where the amounts are based upon some other charge rather than the quantum of the service rendered in the particular instance.

In any event, whether the method employed by the hotels is wise or fair is a matter of hotel management, and it does not convert the charges into charges for wire communication under the Act.

POINT III

The schedule, as construed by the lower court, cannot be defended and enforced under Section 203 on the ground that it is a regulation of the telephone company's service.

A. It is not a regulation to be enforced under Section 203 since it does not affect the charges collected or received by the telephone company.

It may be agreed for the purposes of this point that a common carrier may attach certain reasonable conditions to the furnishing of its common carrier service. These conditions may affect the terms of the contract between the telephone company and a subscriber. They may be enforced through appropriate procedures, or the telephone company may have a right of action for breach thereof. It does not follow, however, that such regulations, merely because included in a filed tariff, would have binding effect and still less does it follow that departure therefrom would constitute a violation of Section 203, to be enjoined in a suit under the provisions of the Communications Act.

It is clear from the language of the statute that the only regulations to be included in a schedule filed under Section 203 are regulations "affecting such charges", meaning the charges collected and received by a common carrier for its communication service.

The restricted language here, thus limiting what is to be shown in schedules filed and enforceable under Section 203 to "charges for itself and its connecting carriers for interstate and foreign wire * * * communication" and "the classifications, practices, and regulations affecting such charges", is in marked contrast with the language of Section 6 of the Interstate Commerce Act. The latter provides that schedules of common carriers filed with the Interstate Commerce Commission shall not only show "all the rates, fares, and charges for transportation" but shall also

> "contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

The use of the words "all privileges or facilities granted or allowed" as well as the language "the value of the service rendered to the passenger, shipper, or consignee" clearly indicate that under the Interstate Commerce Act schedules are to include more than charges and rules, regulations or practices affecting such charges. The absence of such language from the Communications Act plainly indicates that Congress intended that under the latter, schedules enforceable pursuant to Section 203 should deal only with the charges of carriers and with rules, regulations or practices affecting such charges.

As has been previously said, the schedule here does not in any way affect the charges collected or received by the telephone company for its communication service. Therefore, whatever effect such a regulation, if valid, might have in other respects, failure to observe it is not a violation of Section 203 and may not be enjoined in a suit such as this.

B. The schedule is an invalid regulation in that it does not protect any real interest of the telephone company, but attempts to control the charges made by the hotels as customers for their own services.

In certain cases the lawfulness of conditions attached by a carrier to the furnishing of its service may be only a matter of their reasonable character which may be a subject for administrative determination, at least in the first instance. But other conditions may be patently unlawful or may obviously transcend all possible bounds of reasonableness, or they may be wholly inconsistent with a common carrier's obligations, or they may purport to regulate the charges of other persons wholly without the jurisdiction of the regulatory body. Where this is the situation, a court should refuse to enforce the schedule. It is submitted that the telephone company's schedule here falls in the latter category.

It is conceivable that a carrier may by regulations impose conditions on the furnishing and use of its service which would safeguard its equipment from physical damage or would prevent abuse of its service and facilities. On the other hand, it is equally obvious that the telephone company could not lawfully impose conditions upon its offer to serve the hotels which would have no relation to the interests of the telephone company as a carrier but would be merely a device to control its subscriber's business; such as, that a hotel shall not charge more than a certain amount for its rooms; that it shall employ only operators of a certain race or faith or that it shall not serve alcoholic liquors. Where is the dividing line between these two classes of regulations?

It seems clear when these hypothetical regulations are considered that those are permissible which affect the preservation of the carrier's equipment or the maintenance of its standards of operation or prevent abuse of its service. The regulations which seem obviously invalid are those which affect, not the carrier in its business, but only the

ubscriber in its business. This then would seem to be the ppropriate test of validity of regulations in a tariff affect- ng a subscriber. Any other test would enable carriers ot only to control the subscriber's affairs but also to bring nder regulation by the Commission persons not even re- iotely subject to the Act.

Any other test would be almost impossible of reason- ble or consistent application. The use of PBX switch oards is not limited to hotels. They are used in every usiness and law office of any size. They are used in rail- oads, in lighting plants, in industrial plants, in depart- ient stores. The ruling of the Commission and the court elow would permit the Commission to regulate the busi- ess of these organizations on the same theory that it eeks to regulate the business of the hotels, *i. e.*, that the ervice between the PBX board and the extension tele- hone is wire communication. The telephone company ould refuse to provide the service to a company whose rices did not fall within certain limits, to a law office hose charges it considered excessive, to a department tore which sold certain commodities at a loss in order to ttract customers. There would be no valid ground for listinguishing such prohibitions from the prohibition in he tariff under consideration. The line must be drawn omewhere and if it is to afford telephone companies a atisfactory rule for their guidance in drawing their tariffs, egulations must be limited to those which affect the tele- hone companies in their business and not the subscribers n theirs.

Measured by this standard, the condition of the schedule ere involved is clearly invalid. It does not affect the aintenance of the telephone company's service in any espect, it does not affect the telephone company's charges n any respect, it does not prevent any abuse or misuse of ts service. If it be argued that the telephone company s afraid that the service charges may be considered by uests to be part of the long distance toll charge and that hereby guests may gain an impression that the telephone ompany's charges are higher than they actually are, the

answer is that there is not a single word of testimony to that effect. Furthermore, the hotel bills show the hotel's service charges separately, and when a guest pays his bill the slips are at hand showing just what the telephone company's charges are (R. 153).

As a further illustration of this point, let it be supposed that a railroad should publish in its tariff a rate of one dollar per one hundred pounds for transportation from Washington to Chicago, but should insert in its tariff a clause providing that its transportation service would be furnished to a shipper in Washington only on the condition that when he should sell his goods f. o. b. Washington to a buyer in Chicago, the freight being for the buyer's account, he should add nothing to the railroad's rate of one dollar to cover his cost of shipping the goods and of making "the use of the (railroad's) service" available to the buyer. It seems plain that such a tariff provision would be unlawful on its face, as an attempt by the railroad to control the shipper's conduct of his own business and bring it under regulation.

Thus it has been held that a tariff provision of a railroad by which it has attempted to make the measure of its charges dependent upon what a shipper does in his own business with the goods transported is invalid and unenforceable. *In the Matter of Restricted Rates*, 20 I. C. C. 426; *Doran & Company* v. *N. C. & St. L. Ry.*, 33 I. C. C. 523, 531.

If the Interstate Commerce Commission should undertake to enforce a tariff provision such as that in the case supposed, by bringing a suit to enjoin the shipper from billing the Chicago buyer for his cost of packing and loading the freight, paying the railroad and assuming the credit risk, it would plainly be attempting to regulate the business of the shipper and the suit would be dismissed as improper under the Interstate Commerce Act. *Reciprocal Switching at Detroit*, 215 I. C. C. 284.

It is submitted that the present situation is of the same sort. The hotels incur expenses in providing as a part of their hotel accommodations the means, whereby it is

possible for their guests, sitting in their rooms, to make contact through the PBX board with the trunk lines of the telephone company and to transmit wire communications over those lines. These are expenses for which the hotels have not charged in their room rates (R. 159). A guest in a room cannot "ship" a message over a trunk line of the telephone company unless his voice is conducted to the trunk line connection. That is done by the conduits and wires installed at the expense of the hotels and by the labor of the hotels' switchboard operators. They correspond to the overhead carriers or trucks and laborers used by a shipper or by a warehouse company to bring goods to a railroad track and load them into a car.

It is not necessary for the purposes of this proceeding to fix the exact dividing line between the activities of the telephone company and those of the hotels since the hotels incur expenses for some services which could not, on any theory, be claimed to be services performed by or for the telephone company. The precise dividing line would be important only if the amount of the hotels' charges and the rates of the telephone company were in issue. But since the telephone company's schedule would prohibit any charge whatever by the hotels, it is unnecessary to go into this question.

However, if a decision on the point were essential, we submit that the telephone company's service ends at the PBX board, that the operation of the board, which is done by the hotels' employees at the hotels' expense, the establishment of contact between the phones in the guests' rooms and the trunk lines of the telephone company are all acts of the hotels, and that charges therefor do not on any theory come under Section 203.

That the telephone company's service ends at the PBX board is indicated, first, by the fact that it is not the choice of the telephone company that instruments are placed in hotel rooms. This is the election of the hotels themselves. They decide whether there shall be telephone instruments in their rooms; they decide how many instruments they re-

quire; they decide what switchboard facilities they will need and how many trunk lines, and they order these from the telephone company. The telephone company cannot offer communication service from hotel rooms to the public as a common carrier, because neither it nor the public has access to the hotel rooms. Instruments in hotel rooms are available only to guests of the hotel. Furthermore, it is the hotels and not the telephone company which have incurred the expense of making it possible for guests to make telephone calls from their rooms.

It may be suggested that the service between the PBX board and hotel rooms is service performed by the telephone company because its owns the equipment. However, this is the case only because the telephone company, presumably to protect its monopoly, or possibly for service reasons, will not connect with telephone installations acquired from other sources than itself. This case should therefore be treated as though the equipment were owned by the hotels. There is no real reason why the hotels could not buy telephone equipment elsewhere, which they would own, and then make connection between such equipment and the telephone toll lines, and if this were done, the basis for the suggestion that it is the telephone company itself that furnishes the service would disappear. But the mere fact of the telephone company's restrictive regulations does not alter the situation, because it is the hotels who pay for the equipment, it is the hotels who employ the operators to operate it, and, as we have said, it is the hotels that decide what equipment they desire.

And there is, further, the important fact that the instruments and connecting lines within the hotels are used for intra-hotel communication, so that it cannot be said that the fact that they are owned by the telephone company makes their use service by the telephone company. On this point the decision in *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238 (1901) is pertinent. It there appeared that the telephone company provided instruments and lines for internal communication within buildings. It was held that

his was a private matter and not subject to governmental egulation.

An analogy from the transportation field sheds some ight on the problem here. In a large number of cases, both n the courts and before the Interstate Commerce Commission, it has been held that where an industrial plant has ide tracks and connecting tracks within the plant enclosure, which are used not only for the handling of cars of freight moving outbound or inbound in road haul transportation over the railroads but also for switching cars between buildings within the plant for plant purposes, the racks within the plant are part of the industry and not part of the railroad. It has therefore been held that the railroad service to be covered by its tariff rates ends or begins when a car is placed on an interchange track at the entrance to the plant and does not extend through to the point of loading or unloading within the plant, *N. Y. C. & H. R. R. R. Co.* v. *General Electric*, 219 N. Y. 227 (1916); *U. S.* v. *Am. Tin Plate Co.*, 301 U. S. 402 (1936). In the latter case the court upheld the decision of the Interstate Commerce Commission in *Practices of Carriers Affecting Operating Revenues or Expenses*, 209 I. C. C. 11. The PBX board at a hotel corresponds with the interchange track, and the wires and telephone instruments within a hotel are similar to the tracks within a large industrial plant enclosure, being used for both interior communication and for the handling of inbound and outbound through calls.

Another analogy from the transportation field is afforded by the decision of the Supreme Court in *Swift & Co.* v. *United States*, 316 U. S. 216 (1942). This case involved the delivery of livestock handled by a railroad through stockyards in Chicago. The question involved was as to the jurisdiction of the Interstate Commerce Commission and the application of the Interstate Commerce Act to the services rendered by the stockyards company. It had been held that it was part of the obligation of the railroads in the transportation of livestock to provide facilities for the delivery of the livestock shipments and that stockyard companies employed by the railroads for this purpose were

the agents of the railroads and their services were subject to railroad tariffs. It appeared, however, that after the railroad transportation was ended the stockyards performed other services in unloading the livestock into the stockyards, and for these other services the stockyards made a charge. In a complaint filed with the Interstate Commerce Commission, this charge was attacked as unreasonable. It was alleged, also, that the charge was unlawful and in violation of the railroad tariff because consignees could not secure delivery directly from the railroads when the cars were unloaded except through the medium of the stockyards company. This Court held that the Interstate Commerce Commission had no jurisdiction over the charges of the stockyards company for its services after the livestock reached the unloading pens and that these services were not properly subject to tariffs to be filed with the Interstate Commerce Commission, but were stockyards services subject to the regulation of the Secretary of Agriculture, under the Packers and Stockyards Act. The Court said (p: 282):

> "If the Yard Company is in the dual position of being at once the agent of the carriers for the unloading of the stock and the principal in rendering any subsequent services, so is it under dual regulatory schemes and authorities. In so far as it is an agency in transportation, it is subject to the Interstate Commerce Act and to the control of the Interstate Commerce Commission. In so far as it performs stockyard services, it is subject to the Packers and Stockyards Act and to the regulation of the Secretary of Agriculture. The statutes clearly disclose an intention that jurisdiction of the Secretary of Agriculture over stockyard services shall not overlap that of the Commission over transportation. The boundary between the two is the place where transportation ends, and in this case that is established to be the unloading pens."

Similarly here, telephone service ends at the PBX switchboard. What the hotels do beyond that point is hotel service subject to regulation, if at all, as hotel service

by the authorities having regulatory authority over hotel activities.

C. **The schedule is invalid as a regulation in that it is a denial of the obligation of the telephone company as a common carrier.**

Recalling the hypothetical example given under the previous subheading, of a railroad inserting a clause in its tariff to the effect that it would furnish transportation to a shipper in Washington only on the condition that in selling his wares f. o. b. to a Chicago buyer he should add nothing to the railroad's rate to cover his cost of shipping and of making the railroad's service available to the Chicago customer, it would appear that such a regulation would be invalid not only as an attempt to control the shipper's business but also because it would be a negation of the railroad's common carrier obligation.

It is the essence of a common carrier's calling that it is obligated to serve without discrimination all who seek its services and are ready and willing to pay its customary reasonable charges. It cannot make the granting or withholding of its service dependent upon how its patron conducts his own business or upon the terms on which the patron sells his wares. A private industry may, within limits, make any conditions it desires for the sale of its goods or services. It may refuse to sell unless its buyer agrees to certain terms with regard to resale. But a common carrier may not make the furnishing of its service conditional upon such considerations.

Hence, the schedule here is invalid if the telephone company is, as it is deemed to be, a common carrier. If such a condition could be enforced, it would be because the telephone company was not a common carrier, in which event, of course, this action under the Communications Act would not lie.

POINT IV

The lower court's conception of the purpose of the Communications Act of 1934 does not justify the decree.

The learned District Judge said that the Federal Communications Commission was

> "established for the benefit of the public, and to protect the public in regard to such matters as those involved in this case." (R. 52)

He talked of protection against "the telephone companies having a monopoly" (R. 52).

It might be remarked that the hotels are found here to be subscribers—part of the telephone company's "public"—and entitled to protection against its monopoly.

Then the District Judge went on to say that

> "tariff schedules * * * have the principal purpose of protecting the public against being overcharged." (R. 52)

And on the same page he argued that

> "if someone who has gotten telephone facilities as a subscriber, from the telephone company * * * undertakes * * * to render services to the guests, and then undertakes to surcharge and make the charge go above, in amount, the tariff schedule, that would be doing * * * what the law * * * did not mean to allow." (R. 53)

Of course, it is not for the court to substitute its views as to the purpose to be achieved for the intention of Congress as indicated by the language used in the statute. But it is submitted that any idea that it is contrary to the purpose of statutes regulating carriers to permit one who has purchased carrier service as a shipper or subscriber, and then adds other services and expenses of his own, to collect from his customer more than the carrier's tariff charge is in conflict with long established administrative practice.

An analogy from the field of transportation is the freight forwarder, as that term is used in domestic railroad transportation. A forwarder is one who undertakes to furnish to individual shippers of small lots through transportation of their freight by railroad or other common carriers. He assembles a number of small unit shipments; he obtains a car from the railroad, just as the hotels obtain telephone equipment from the telephone company; he loads the small shipments into the car and delivers them to the railroad at the terminal of its line, just as the hotel delivers to the telephone company at its trunk line through the PBX board the communications of its guests from their hotel rooms. The forwarder stands in the relation of shipper to the railroad and is obligated to pay the railroad's tariff rates which it charges to all shippers, *Warehouse Co.* v. *United States,* 283 U. S. 501, 512 (1930); *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 444. Similarly, a hotel stands in the relation of subscriber to the telephone company and is obligated to pay the telephone company's telephone rate for all messages which it delivers to the telephone company at the PBX board, whether they originate in the hotel office or in a guest's room. The forwarder, in turn, makes a charge to his individual shippers for his own services over and above the amount which the forwarder pays in freight to the railroad. It has been held that the forwarder is not a railroad, that the service which the forwarder provides is not railroad service and that, therefore, the forwarder's charges are not to be specified in tariffs filed with the Interstate Commerce Commission and do not come under the jurisdiction of that Commission, *Acme Fast Freight* v. *United States,* 30 F. Supp. 968 (C. C. A. 2nd, 1940); affirmed per curiam, 309 U. S. 638.

But it has not been held that because a forwarder uses rail transportation to which he adds his own services of assembling and loading he may charge his customers no more than the railroads' tariff rates, nor has it been held that a forwarder illegally sells railroad service.

An appeal to public policy, similar to that invoked by the lower court here, was made with regard to freight for-

warders in *Int. Comm. Comm.* v. *Del., L. & W. R. R.*, 220 U. S. 235. Mr. Chief Justice WHITE stated the contention thus (p. 255):

> "Conceding, for the sake of the argument, the correctness of the construction which we have given to the second section, it is urged that nevertheless, as a forwarding agent is a 'dealer in railroad transportation', and depends for his profit in carrying on his business upon the sum which can be made by him out of the difference between the carload and the less than carload rate, and may discriminate between the persons who employ him, therefore the act to regulate commerce should be construed as empowering a carrier to exclude the forwarding agent as a means of preventing such discriminations."

It was held that since there was no express statutory authority, the practices of the forwarding agents of obtaining railroad transportation at carload rates and selling transportation to shippers of smaller quantities at higher charges could not on such a ground of supposed public policy be found unlawful under the Interstate Commerce Act.

The same error of being guided by its own views of public policy as to what should be subject to its regulatory authority rather than by the language of the Act is evident in the Commission's report, where it said:

> "If the collection of such surcharges were not subjected to regulatory control, a subscriber, or anyone else other than the telephone company, who is permitted by the telephone company to control access to the use of a telephone, could freely resell interstate and foreign telephone service, imposing any charges of his own on such use." (R. 26)

The conclusion does not follow the premise. The hotels are not making a profit by reselling telephone service at a higher rate than they pay therefor. They are adding their own services, which the telephone company refuses to perform, and are making reasonable charges therefor in addi-

tion to the charges of the telephone company. The decision in *Swift & Co.* v. *United States,* 316 U. S. 216 (1941), cited under the previous point, is also pertinent here. The problem was similar except that it involved "egress" from rather than "access" to the carrier's services. The Court said (p. 232):

> "Because the Yard Company in this specific and limited matter acts as agent for the railroads, and in the performance of that transportation service is subject to the jurisdiction of the Interstate Commerce Commission, it does not follow that the Commission may regulate, either directly or somehow, through the railroads, the other practices and charges of the Yard Company."

It held that the fact that egress from a railroad terminal was involved and that such egress could be had only through the stockyards did not prevent the stockyards from making a charge for their services and facilities nor did the fact that this affected the availability of railroad service give the Interstate Commerce Commission jurisdiction where such jurisdiction was not conferred by the language of the statute.

As Mr. Justice FRANKFURTER in the Opinion of the Court in *Scripps-Howard Radio* v. *Comm'n,* 316 U. S. 14 (1941), said with regard to an appeal to policy under another section of the Communications Act:

> "The considerations of policy which are invoked are as fragile as the legislative materials are inapposite."

POINT V

Enforcement of the telephone company's schedule if construed as prohibiting the hotels from making any charge for their services and expenses would be confiscatory.

The tariff schedule, if it were lawful and enforceable under the Communications Act, would have the controlling

effect of a statute, *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197 (1912).

This action to enforce the schedule is brought by the Government at the request of the Communications Commission, a regulatory agency. Moreover, it is alleged that the tariff schedule was filed pursuant to the Commission's order of December 10, 1943 (R. 9).

Under these circumstances, the enforcement of the schedule would plainly be an act of government and open to challenge under the Fifth Amendment if its result would be to take the property of the hotels for public use without just compensation. It is submitted that such would be the result.

The evidence shows that in the case of the Shoreham, the hotel taken as typical, the labor cost alone incurred by it in the year 1943 for the telephone operators and supervisors which it employed in providing service to its guests amounted to $21,895.62 and the annual cost of the equipment necessary for the service was $8,680.10. These figures include nothing for such other items of cost actually incurred by the hotels as overhead, rental of space, heat and light (R. 162). It is to compensate themselves for these costs that the hotels make their service charges involved in this suit. They secure compensation therefor in no other way. The uncontradicted evidence was that these costs are not included in the room rates charged to guests by the hotels nor in their food and beverage charges (R. 163). Consequently, if the hotels continue to make it possible for their guests to make and receive toll telephone calls in their rooms and continue to provide their guests with their various secretarial services, the result of enjoining them from making their service charges would be to deprive them of compensation for their services and thus take their property without just compensation and, indeed, without any compensation. It may be that the hotels could avoid such consequences by discontinuing their services, but this is a solution of doubtful practicality and it does not meet the legal objection which would deny compensation if the service is rendered.

It is likewise no answer to the objection here urged that the telephone company has made an offer to pay the hotels a commission of 15 per cent. But in any event the proposed commission does not represent an act of the Commission. It is not even embodied in any schedule so that the offer may be withdrawn at any time and it is not made a condition of the enforcement of the schedule that the hotels receive compensation for their services through such a commission from the telephone company.

POINT VI

The telephone company's schedule is valid only if construed as not having reference to the service charges of the hotels. Under such a construction, there is no violation of Section 203 and the suit should be dismissed.

The discussion so far in this brief has proceeded upon the assumption that the telephone company's schedule here under discussion is to be construed as prohibiting the hotels, as a condition of receiving toll telephone service, from continuing to make their own service charges for their hotel and secretarial services. This is the interpretation of the schedule placed upon it by the court below and by the Commission in causing the institution of this suit.

It is possible, however, that the schedule does not have this effect and should not be so construed. It provides that the "use of the service by guests shall not be made subject to any charge by any hotel * * * in addition to the message toll charges of the telephone company". The "service" referred to is "message toll telephone service". This service furnished by the telephone company is, as we have seen, something different and distinct from the services rendered by the hotels. Whether the telephone company's service is deemed, as we believe, to end at the PBX board or whether it includes the transmission of calls to and from the telephone instruments in hotel bedrooms, it certainly does not embrace the secretarial services and

other services which the hotels provide and which the telephone company expressly states that it does not provide.

It is submitted that it is reasonable to interpret the schedule as meaning that it is for the telephone company's service, as distinguished from the additional services furnished by the hotels, that no charge is to be made in addition to the telephone company's tariff rates. Indeed, such an interpretation is logically necessary if the schedule is not to be given a meaning far more restrictive even than that contended for by the Commission. Its language appears to permit a choice of only two interpretations—either that just suggested or an interpretation under which the hotels as a condition of receiving toll telephone services would be prohibited even from charging for their rooms. For guests cannot make telephone calls from hotel rooms without first having access to the rooms, so that in making a room charge the hotels literally make "the use of the service (toll telephone service) by guests" subject to a charge in addition to the telephone company's rates. Likewise, on such an interpretation, and apparently under the lower court's theory that no one wanting to use a telephone should be required to pay more than the telephone company's rates, a movie theater could not charge admission to a person seeking to enter the theater for the purpose of using a telephone in the theater lobby.

It is elementary that where tariff provisions are subject to two or more possible interpretations the more reasonable should be adopted and also the language should be construed against the carrier framing it. *Norwich Wire Works, Inc.* v. *Boston & M. R.*, 229 I. C. C. 395, 398; *Andrae & Sons Co.* v. *Chicago, M. & St. P. Ry. Co.*, 153 I. C. C. 227, 229.

It is likewise elementary that an interpretation under which a tariff provision would be lawful should be adopted in preference to one under which it would be invalid. *Great Northern Ry.* v. *Delmar Co.*, 283 U. S. 686, 690, 691; *Penn Oil Co.* v. *Atchison, T. & S. F. Ry. Co.*, 188 I. C. C. 351, 354.

These considerations argue that the schedule here involved should be construed only as prohibiting the hotels from making a charge in addition to the telephone company's rates for the services which the telephone company provides, but not as prohibiting them from making service charges for their own hotel and secretarial services. On this construction there has been no violation of the schedule, and the suit should be dismissed.

POINT VII

In view of the lower court's finding that the telephone company was not violating the Act, it was error to enjoin the hotels.

The hotels were joined as defendants under Section 411(a) of the Communications Act of 1934 (47 U. S. C. 411) (R. 4). This section provides:

> "(a) In any proceeding for the enforcement of the provisions of this chapter, whether such proceeding be instituted before the Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

It is not denied that the hotels are "interested in or affected by the charge, regulation or practice under consideration". Therefore, by the terms of Section 411(a) it appears to be lawful to include the hotels as parties in this proceeding. It does not follow that an injunction may issue against them if none is warranted against the telephone company.

The only provision in the section for a decree against the hotels is found in the words "decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers." If the carriers involved in this proceeding are not in violation of Section 203 of the Communications Act of 1934 and it has been expressly held that they are not, it is difficult to find in Section 411(a) the authority under which a decree was entered against the hotels. On the contrary, by authorizing decrees against additional parties only "to the same extent" as with respect to carriers, Section 411(a) provides, in effect, that if no decree "shall be authorized by law" against the carriers, then no decree is authorized against the additional non-carrier parties who are included in the suit only by virtue of Section 411(a).

This reasoning is confirmed by the fact, previously referred to, that according to its terms Section 203 can be violated only by a carrier since its prohibitions run only to carriers. Hence, if the carrier is not violating Section 203, there is no violation of the statute and obviously there can be no injunction against anyone if there is no violation to enjoin.

Further support for this conclusion is found in the penalty provision of Section 203, paragraph (e). If there is a violation of Section 203, not only may it be enjoined, but the statute also provides penalties. However, it is only the carrier which is liable therefor.

It is plain that it is the purpose of Section 411 to make it possible, in the event of a violation of the Act by a carrier, to afford complete assurance against repetition or continuance by enjoining the carrier and also enjoining the subscribers or other parties involved. But unless there is a violation by the carrier, there is no basis for a decree against a subscriber.

POINT VIII

This case is distinguishable from the cases relied upon by the Commission in its report.

Judge O'Donoghue in his opinion cited no authorities in support of his conclusions. However, a number of decisions are cited by the Commission in its report (R. 27) in support of its order, pursuant to which the schedule here in issue was filed. The Commission cited these decisions with the remark

> "that courts and other commissions which have considered the problem of surcharges similar to those in question here have concluded that such surcharges are subject to regulation by the public utility commission as part of the regulation of public utility telephone service." (R. 27)

This comment is in itself sufficient to distinguish these cases from the one at bar since, in view of the fact that the hotels are neither carriers themselves nor agents of the telephone company, it cannot be found that their services are telephone communication services subject to the Communications Act. This distinction is confirmed by an examination of the cases themselves. Only two of the cases cited went to the courts, *Hotel Pfister* v. *Wisconsin Telephone Co.*, 203 Wis. 20 (1930), and *People ex rel. Public Service Commission* v. *New York Telephone Co.*, 262 App. Div. 440 (1942), affirmed 287 N. Y. 803.

The theory of the *Pfister* case was that the telephones in hotel rooms were public telephones and that the hotel was the agent of the telephone company. The court said (p. 24):

> "It is quite true, of course, that the hotel is not a public utility. But even so it may, like any other corporation or private person, be the agent of the company in aiding it to perform its service to the public."

Likewise in the *New York* case the decision was predicated upon agency. There it appeared that the schedules of the telephone company "designate hotel subscribers as agents of the telephone company in rendering telephone service to their guests".

The finding of the court below that no agency relation exists here between the hotels and the telephone company and the evidence amply sustaining that finding require the conclusion that the principles of the cases cited are not applicable here. Moreover, there is the factual difference that in both of the cases cited the tariff of the telephone company provided for the collection of an extra charge over and above its ordinary rates in the case of telephone calls made from hotel rooms and provided compensation to the hotel out of such additional charge, whereas here the schedule would prohibit any extra charge.

Conclusion

In the last analysis, the decision in this case must turn largely upon the relationship which exists between the hotels and the telephone company. Three possibilities suggest themselves and have been suggested in the report of the Commission:

The first possibility is that the hotels are agents of the telephone company to complete its service, that everything they do is done for the telephone company, and that the charges which they collect are charges of or for the telephone company. If this were the situation, it would be proper to conclude that the tariff specifies or affects the charges collected by the telephone company through the agency of the hotels for telephone communication service furnished through the same agency. The only question would then be as to the reasonableness of the schedule and this would be a matter for the Commission. Even here it is not clear that the hotels as agents could violate the tariff and Section 203 of the Act if there were no violation on the part of the telephone company as their principal. This conception of the situation is, however, definitely barred

by the decision of the lower court that no relation of agency exists between the hotels and the telephone company.

The second possibility is that the hotels are themselves common carriers and engaged in providing communication service to the public and are connecting carriers of the telephone company. In this event, the hotels' charges would be subject to regulation by the Commission and should be shown in tariffs filed with it. Even so, a tariff filed by the telephone company purporting, without their consent, to fix the hotels' charges would not be valid and enforceable as a tariff or joint service. However, neither the Commission nor the court has found that the hotels are connecting carriers.

The third possibility is that the hotels are subscribers; in other words, patrons of the telephone company's service. The lower court so found. The schedule plainly treats the hotels as subscribers. This is the correct interpretation of the relationship. In this relationship no violation of Section 203 exists and the present suit cannot be maintained because (a) the hotels' charges are not charges by or for a carrier for communication service under the Act; (b) the schedule here does not specify or affect the charges collected or received by the telephone company for its communication service, and is therefore not a schedule enforceable under Section 203; and (c) the statute does not permit the filing with the Commission and enforcement under Section 203 of a schedule, such as that here, specifying or regulating the charges made by subscribers for their own goods or services or making the furnishing of refusal of telephone service dependent thereon.

The judgment below should be reversed.

Respectfully submitted,

PARKER MCCOLLESTER,
GEORGE DEFOREST LORD,
JOSEPH W. WYATT,
Attorneys for Appellants.

February 16, 1945.

Appendix

Pertinent Provisions of the Communications Act of 1934

(June 19, 1934, 48 Stat. 1064 ff., 47 U. S. C. §§ 151 ff.)

SECTION 153(a):

"Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

SECTION 153(h):

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

SECTION 153(r):

"Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

SECTION 153(s):

"Telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

SECTION 201(a):

It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

SECTION 202(a):

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

SECTION 203:

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such

charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

SECTION 401:

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

(d) The provisions of sections 28 and 29 of Title 15, section 345(1) of Title 28, and sections 44 and 45 of Title 49, shall be held to apply to any suit in equity arising under sections 201-221 of this title, wherein the United States is complainant.

SECTION 411(a):

In any proceeding for the enforcement of the provisions of this chapter, whether such proceeding be instituted before the Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.